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THE JUDICIAL COGNIZANCE OF FEDERAL, AS COMPARED WITH STATE COURTS.

The editorials in the two issues of this journal next preceding this have concerned themselves with jurisdiction of federal courts and we, perhaps, should offer some apology for confining our attention so much to questions of this nature.

But what appears to us a very interesting concession to state courts, is found in a recent opinion by Justice Peckham in the case of Welch v. Swasey, 29 Sup. Ct. 567, 214 U. S. 91.

The question before the court was as to the validity of a Massachusetts statute authorizing the city of Boston to limit the height of buildings in residential and business districts, a less height being authorized for the latter district than the former.

It was claimed that such a discrimination was not reasonable and not justified under the police power.

Here it is perceived was a distinctly federal question and one would suppose, that the court having a controlling voice in such a question ought to be presumed to be able to take judicial notice of everything that might be supposed to be within the judicial cognizance of any other court.

The opinion shows, however, that the case, which was appealed from the Supreme Judicial Court of Massachusetts, was affirmed out of deference to the superior judicial cognizance of the state court, holding the statute constitutional. We make the following quotation from the opinion of Justice Peckham: "In passing upon questions of this character as to the validity and reasonableness of a discrimination or classification in relation to limitations as to height of buildings in a large city, the matter of locality assumes an important aspect. The particular circumstances prevailing at the place or in the state where the law is to become operative,—whether the statute is really adapted, regard being had to all the different and material facts, to bring about the results desired from its passage; whether it is well calculated to promote the general and public welfare,—are all matters which the state court is familiar with; but a like familiarity cannot be ascribed to this court, assuming judicial notice may be taken of what is or ought to be generally known. For such reason this court, in cases of this kind, feels the greatest reluctance in interfering with the well-considered judgments of the courts of a state whose people are to be affected by the operation of the law. The highest court of the state in which statutes of the kind under consideration are passed is more familiar with the particular causes which led to their passage (although they may be of a public nature) and with the general situation surrounding the subject-matter of the legislation than this court can possibly be. We do not, of course, intend to say that, under such circumstances, the judgment of the state court upon the question will be regarded as conclusive, but simply that it is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong." Judicial cognizance is seen to be based on environment. The national court is not presumed to know like a state court does, of local conditions. Conversely, possibly it might be claimed that a state court has an inferior cognizance of facts of a distinctly national character. That, however, is not a practical inquiry, as, if there is the like cognizance, the federal court of last resort controls the situation.

We are enamored, however, of the principle of deference which has influenced our greatest court. It and the principle of reluctance on the part of that court to interpose its authority against the enforcement of a state's fiscal laws, which we lately discussed (68 C. L. J. 441), run on parallel lines and make for a larger respect for state courts and state autonomy.

We see no more difficulty in applying this principle of deference to the presumptively superior knowledge of state courts as to

facts than to recognition of the presumptively superior ability of a state court in construing state statutes. And just as in the latter contingency a decision in a particular case might not be regarded as a binding precedent, so it would not be in the former. In other words, in neither of such cases does the court exercise its independent judgment.

But if the federal supreme court may be considered as less assisted, sometimes, by judicial cognizance, than a state court, in regard to a federal question, might it not be said that presumptively it always is in that situation in regard to state law—or even that it is not presumed to be thus assisted at all? Under the last presumption its interpretation of law would be solely from an intellectual standpoint, and a state court's position would be greatly superior to that of a federal court, as to a great many questions.

This proposition may seem academic, but, if it were fairly and fully conceded, much friction between state and federal courts could be avoided. If recognized to be true and, yet, disregarded, federal courts might incur the suspicion of being gratuitously aggressive.

NOTES OF IMPORTANT DECISIONS.

MINORS—DISTINCTION BETWEEN CIVIL AND COMMON LAW IN COMPUTATION OF AGE.—In Louisiana the civil law remains the rule of practice and decision where the statute is silent, and we believe it stands alone in this regard in this country, at least so far as the present day acquisition or vesting of rights is concerned. The common law rule that a minor attains his majority on the beginning of the day preceding the twenty-first anniversary of his birth is, we believe, recognized by all. The code of Louisiana reads: "Minors are those of both sexes, who have not yet attained the age of one and twenty years complete," which is a literal translation of what appears in the Code Napoleon.

The court thus presents the matter upon authority in Fleming v. Joyce, 49 So. 221:

"Baudry-Lancantinerie, in his Treatise of the Civil Law, commenting on article 488 of the Code Napoleon relative to the age of majority, says that the Romans computed the time for attaining the age of majority by hours, de momento ad momentum, and not de die ad diem, and that this is the proper mode of computation under Code Napoleon, art. 388, because another article (57) requires the hour to be inserted in the registration of births. The only difference among the French commentators, according to this author, is as to the particular moment of the twenty-first anniversary at which the minor attains majority, some contending for the first moment of the first hour and others for the last moment of the last hour. Id. vol. 4, pp. 705-707. The same writer says that the political majority is governed by the same principles, except as to the exercise of certain functions. Id. p. 707, note. Mourlon, in discussing Code Napoleon, art. 488, advocates the computation from day to day on account of the express codal adoption of this method in the matter of the suspension of prescription. In the calculation from day to day, the fraction of the day in which the birth took place is not counted. Thus the child born on the first day of January, 1860, at noon, will not become a major until the first minute of the 2d day of January, 1881. Id. Examen du Code Napoleon, vol. 1, fol. 622, Nos. 1267-1269.

In the Carpenter-Du Saint 'Repertoire General de Droit Francais,' vol. 28, folios 62, 63, it is stated that there are three theories of modes of computing the age of majority, viz.:

(1) The minor acquires his majority at the commencement of the anniversary day of his birth. Thus, a minor born June 30, 1883, will become a major June 29, 1904, at midnight.

(2) The minor becomes of full age at the expiration of the anniversary day of his birth. Thus a minor born June 30, 1883, will not become a major until June 30, 1904, at midnight.

(3) Where the hour is fixed in the certificate of birth, majority is computed de momento ad momentum.

Hence, under article 37 of our Civil Code the proposition that a minor attains 'the age of one and twenty complete,' or becomes of 'full age' on the day preceding his twenty-first birthday, is clearly inadmissible."

All of which is quite interesting to lawyers who have, as a rule, little to do, in a practical way, with civil law questions, unless they are tracing the origin of rights acquired some century or so ago.

Thus we see that of twins, the one living in Louisiana is always a day younger than his brother or sister living elsewhere.

LIBEL AND SLANDER—WHAT IS LIBELOUS PER SE AS TO A BUSINESS CORPORATION.—A publication is libelous per se when it directly affects the character and subjects one to humiliation and disgrace and when it directly affects his business credit, occasioning business injury. Lately it has been said by the New York Supreme Court, in Appellate Division, that: "A corporation having no character to be affected by libel and no feelings to be injured, to be libelous, per se, the article must be such as directly to affect the credit or property of the corporation and to occasion it pecuniary injury. It is only where the court can see that, by reason of the nature of the publication, direct pecuniary injury will naturally flow from the publication, that the action can be maintained without the allegation that such damage has actually resulted from the publication." Kimble & Mills v. Kaighn, 115 N. Y. Supp. 809.

Under this rule it was held that a publication charging a corporation with having bribed one of defendant's solicitors, an expert accountant, into giving it a list of defendant's clients, did not give any action for damages in the absence of an allegation that special damage had been occasioned by such publication. It was said: "The article complained of makes no charge against plaintiff as to the conduct of its business. It contains no reflection upon its method of conducting its business, or that can affect its property or credit. It undoubtedly charges the plaintiff with an act which would be injurious to the character of a private individual, for I assume that the charge that a private individual had bribed the employee of a business firm, would be libelous per se. * * * It certainly cannot be assumed that any of the plaintiff's customers would have withdrawn from their relation with it because it was said that it had bribed the employee of a business firm."

One of the five judges dissents from the conclusion, saying among other things that "it would seem that the charging of a corporation with so corrupt and dishonorable business methods as to bribe and debauch the servant of another to give it secret information concerning his master's affairs, must necessarily affect and imperil its credit and business standing."

It really looks like the reasoning of the dissenting judge is more nearly correct than that of the majority. After all, however, it is wholly impossible to draw a line as to infamous publications libelous per se, only when they naturally import business injury.

But at least it ought to be somewhat assumed that a reputation for business integrity is valuable alike to a corporation as to an individual, and a judge is going some length in saying that it cannot be assumed a corporation thus charged would not lose customers, when it is conceded that an individual or a partnership would. The latter would be presumed to lose business because they were guilty of dishonorable practices, but customers will as surely avoid a corporation's business dishonorably managed as that of an individual so managed.

The presumption that dishonorable methods will continue is as strong in one case as the other.

FEDERAL INJUNCTION OF STATE OFFICIALS TO PREVENT THE ENFORCEMENT OF LAWS CLAIMED TO BE CONFISCATORY.—I. WHEN ARE STATE ENACTMENTS DEEMED TO BE CONFISCATORY?

The statement of the subject indicates that the discussion should be limited to the determination of three propositions:

I. When are state enactments deemed to be confiscatory?

II. It being alleged that the state enactment is confiscatory, have the federal courts jurisdiction to restrain its enforcement by injunction?

III. Can the federal courts enjoin state officials from enforcing confiscatory laws?

The answer to these propositions are to be found for the most part in the adjudications made upon the Eleventh and Fourteenth Amendments to the Constitution of the United States. The attempt to fix charges and make other regulations governing public service corporations has been productive of a great amount of litigation wherein the construction of these Amendments was involved. Especially has this been true in connection with the recent rate laws passed by the states. This discussion will be confined largely to a consideration of the law and its development as shown in these cases.

I. *When are State Enactments Deemed to be Confiscatory?*—1. *The Fourteenth Amendment.*—The Fourteenth Amendment provides that no state shall "deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[1] For several years after its adoption this Amendment was thought to protect negroes, as a class, and had no application to other persons.[2] In the case of Santa Clara County v. Southern Pac. Railroad Company it was held that the Amendment applied to corporations.[3] Prior to this decision in Munn v. Illinois[4] and the Granger Cases,[5] decided in 1876, it was held that under the police power, where property was affected with a public interest, as in the case of a grain elevator or railroad, the legislature could by law fix the maximum rate which could be charged for its use.[6]

(1) The term "confiscatory," as used in this connection, does not have the meaning which is usually applied to it. (Bouvier, Law Dict.) As here used, it means the taking of property without due process of law contrary to the provisions of the Fourteenth Amendment. Stone v. Trust Co., 116 U. S. 307, 331; Chicago, etc., Ry. Co. v. Dey, 35 Fed. 880; So. Pac. Co. v. Bd. of Railroad Commrs., 78 Fed. 261; San Diego Water Co v. San Diego, 62 Am. St. Rep. 288. The preliminary question in such cases, then, is to determine when the rate fixed or regulation prescribed is so unjust and unreasonable as to work a taking of property without due process of law.

(2) Holden v. Hardy, 169 U. S. 366,382. Mr. Justice Miller said: "We doubt very much whether any action of a state not directed by way of discrimination against negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."

(3) In County of Santa Clara v. So. Pac. R. Co., 18 Fed. 385, Mr. Justice Field said: "The wrongs which were supposed to be inflicted upon or threatened to citizens of the enfranchised race, by special legislation directed against them, moved the framers of the amendment to place in the fundamental law of the nation provisions not merely for the security of those citizens, but to insure to all men, at all times, and at all places, due process of law, and the equal protection of the laws."

(4) 94 U. S. 113.

(5) Peik v. Chicago & Northwestern Ry Co., 94 U. S. 164; Chicago, Milwaukee & St. Paul v. Aikley, 94 U. S. 179.

(6) In Peik v. Chicago, etc., Ry. Co., Chief Justice Waite said: "Where property has been clothed with a public interest, the legislature may fix a limit to that which in law shall be reasonable for its use. If it has been improperly fixed, the legislature, not the courts, must be appealed to for a change." 94 U. S. 178; Terry v. Anderson, 95 U. S. 633. See Chicago, Burlington & Quincy R. R. Co. v. Iowa, 94 U. S. 164, for general question of legislative power over railroads. See also Railroad Commission Cases, 116 U. S. 307.

The broad proposition announced in these cases, when it came to be considered in connection with adjudications made under the Fourteenth Amendment, and the confiscatory acts of the state legislatures in fixing rates, soon required some limitation. This was done in the Railroad Commission Cases,[7] where it was held that "The power to regulate is not the power to destroy, and limitation is not the equivalent of confiscation."[8] The development soon indicated that, notwithstanding the inferences irresistibly arising from the early cases decided in the national courts,[9] that the question of reasonableness was a legislative question, it was settled that these earlier cases must be taken in connection with the limitations interposed by the Constitution, and especially the one denying the right of the state to deprive any person of property without due process of law.[10]

2. *The Unreasonableness of the Rate is a Judicial Question.*—The court will not determine what is a reasonable rate, for this is a legislative or administrative question.[11] But it has been settled that where the rate is fixed, either by the legislature or its commission,[12] the question

(7) 116 U. S. 307.

(8) 116 U. S. loc. cit. 331. It was held in this decision that the legislature had power to limit the charges, but in so doing could not take the property. Winona & St. Peter Railroad Co. v. Blake, 94 U. S. 155; Ruggles v. Illinois, 108 U. S. 526, 531.

(9) See Wabash Ry. Co. v. Illinois, 118 U. S. 557, 577, explaining earlier cases.

(10) For "due process of law," see: McGehee, Due Process of Law, Northport, 1907. Murray v. Hoboken Land Co., 18 How. 272; Davidson v. New Orleans, 96 U. S. 97; Hurtado v. California, 110 U. S. 516; Chicago, etc., Ry. Co. v. Minnesota, 134 U. S. 418.

(11) Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 397.

(12) Budd v. New York, 143 U. S. 517. In this case Mr. Justice Blatchford affirming Munn v. Illinois, distinguished the case under consideration from Chicago, etc., Ry. Co. v. Minnesota, on the ground that in the latter case a commission, and not the legislature, fixed the rate. He said: "What was said in the opinion in 134 U. S., as to the question of the reasona-

whether such rates are so unreasonable as to deprive the complainant of his property without due process of law is a judicial question.[13]

3. *The Test of Unreasonableness.*—In determining whether a given rate is unreasonable or not the courts are dealing with a question of fact, and the rule adopted, as a test, must be applied to facts of a diversified and complicated nature. It may, therefore, be expected that the test, in order to cover all cases, must be very general. The courts have not formulated any rule which definitely determines, as a matter of law, when a rate is reasonable, and it is doubtful if any such rule can be laid down.[14]

Any rule that is to be laid down here must have its foundation in justice. There are in all these cases, at least, the rights of two parties to be considered,—the public and the owners of the corporation. It is the province of the court to see that justice is done to both parties. It is submitted that there can be no justice in an act of the legislature which works on investors a practical destruction of their property. There must be allowed a fair return on the property invested, having a due regard to the rights of the public, in order that justice may be done to its owners. If the Fourteenth Amendment permits the taking of the value of property so long as the mere physical property is left, then, as one judge has said, it is a "composition of delusive words."[15]

The rule laid down by Mr. Justice Miller, in Chicago, etc., Ry. Co. v. Minnesota,[16] which was again announced, in effect, in Smyth v. Ames,[17] and the application of the Fourteenth Amendment declared, may be taken as the test. In the latter case the court said: "A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the

bleness of the rate of charge being one for judicial investigation, had no reference to a case where the rates are prescribed by the legislature."

(13) Chicago, &c., Ry. Co. v. Minnesota, 134 U. S. 418, 458; Chicago, &c. Ry. Co. v. Wellman, 143 U. S. 339, 344; Chicago, &c. Ry. Co. v. Tompkins, 176 U. S. 167, 172; St. Louis &c. Ry. Co. v. Gill, 156 U. S. 649; Covington, &c. Turnpike Co. v. Sandford, 164 U. S. 578; Interstate Com. Com. v. Cincinnati &c. Ry. Co., 167 U. S. 499; Smyth v. Ames, 169 U. S. 466; San Diego Land Co. v. National City &c. 174 U. S. 748; Cleveland &c. Coke Co. v. Cleveland, 71 Fed. 614; Capital City Gas Co. v. Des Moines, 72 Fed. 822; San Joaquin &c Irr. Co. v. Stanislaus County, 90 Fed. 521; Cotting v. K. C. Stock Yards Co., 79 Fed. 684; In the Reagan case, supra, Mr. Justice Brewer (at page 397), said: "The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all the circumstances would be fair and reasonable as between the carriers and shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

(14) Ames v. Union Pac. Ry. Co., 64 Fed. 177.

(15) So. Pac. Ry. Co. v. Bd. of Commrs., 78 Fed. 1. c. 261. This was said in reviewing the decision of Mr. Justice Brewer in Chicago & Northwestern Ry. Co. v. Dey, 35 Fed., wherein the court said: "The rule, therefore, to be laid down, is this: That where the proposed dates will give some compensation, however small, to the owners of the railroad property, the courts have no power to interfere. Appeal must then be made to the legislature and the people." (at page 879.) But this view was retracted by Mr. Justice Brewer in Ames v. Union Pac. Ry. Co., 64 Fed. at page 176-7, where he said: "The value of the property cannot be destroyed by legislation, depriving the owner of adequate compensation. * * * The protection of property implies the protection of its value." See also the Reagan case, 154 U. S.; Smyth v. Ames, 169 U. S. 1. c. 523; Milwaukee Electric &c. Co. v. Milwaukee, 87 Fed. 578; Ball v. Rutland R. R. Co., 93 Fed. 516; Cleveland City Ry. Co. v. Cleveland, 94 Fed. 409.

(16) 134 U. S. 418, 1. c. 458. Mr. Justice Miller said: "Neither the legislature nor its commission under the authority of the legislature, can establish arbitrarily, without regard to justice and right a tariff of rates for such transportation which is so unreasonable as to practically destroy the value of the property of persons engaged in the carrying business, on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation, on the other."

(17) 169 U. S. 1. c. 526; San Diego Land Co. v. National City, &c., 174 U. S.; Lake Shore &c. Ry. Co. v. Smith, 173 U. S. 687, 755; Smyth v. Ames, 171 U. S. 362; Proutt v. Starr, 188 U. S. 537; Cotting v. K. C. Stock-Yards Co., 79 Fed. 684; Minneapolis &c. R. R. Co. v. Minnesota, 186 U. S. 267; Atlantic Coast Line Ry. v. North Car. Corporation Commission. 206 U. S. 24; Memphis &c. Co. v. Memphis, 72 Fed. 955; San Diego Water Co. v. San Diego, 62 Am. St. Rep. 268.

carrier earning such compensation as under the circumstances is just to it and the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States."

4. *A Qualification of the Rule Announced in Smyth v. Ames.*—There has been what appears to be a qualification of the above rule, in that a particular rate, or order of a commission which requires the railroad to provide certain facilities, which may work an incidental pecuniary loss to the railroad will be upheld, where such rate or order does not of itself work a loss of the profitableness of the operation of the railroad as an *entirety*. In other words, the railroad may be required to provide facilities to the public which do not pay, but if the operation of the railroad as a whole is reasonably profitable, the railroad will be required to provide the facilities ordered.[18] But the doctrine of Smyth v. Ames is controlling,[19] and while "each case must be determined by its own considerations," the requirement is, that justice be done to the public and the owners of the property. The rule considers and protects the rights of all parties. The rate, having been established, it is taken to be reasonable until it has been shown to be otherwise,[20] and keeping in view the rights of all parties concerned, the courts will determine whether the rates fixed are unreasonable; and if the rates are so unreasonable as to deprive persons of property, then they are confiscatory, within the meaning of the term as here used, and are prohibited by the Fourteenth Amendment.

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(18) Nor. Car. Corp. Com. v. Atlantic &c. Ry., 206 U. S. 24, 27.

(19) Gunter v. Atlantic Coast Line Ry. Co., 200 U. S. 273; McNeill v. Southern R. Co., 202 U. S. 202; U. S. 543. See cases cited in Note 2, p. 8, herein.

(20) Minneapolis &c. R. R. Co. v. Minnesota, 186 U. S. 264; Chicago &c. Ry. Co. v. Tompkins, 176 U. S. 167, 173; Dow v. Beidelman, 125 U. S. 680. This requirement is just for the carrier has a much better opportunity to produce the proof to substantiate the claim of unreasonableness than the public has to show that a given schedule of rates is reasonable.

PARTY WALL — COVENANT RUNNING WITH THE LAND.

CRAWFORD v. KROLLPFEIFFER.

Court of Appeals of New York, April 6, 1909.

Plaintiff and another, being owners of adjoining parcels of land, agreed in writing that plaintiff should forthwith construct a party wall along the common boundary line, and that he or his assigns should bear the entire cost of constructing the wall, and that the other party or his assigns could use the wall on payment of $500, and that the agreement should bind the heirs, executors, and assigns of the parties and should be a covenant running with the land. Held that, the agreement not contemplating the present construction of the party wall, but authorizing its construction in the future, it was not a covenant running with the land, and therefore the grantees of the executors of the second party were not liable on the agreement for use of the wall.

The plaintiff and Francis Crawford were owners of adjoining parcels of land, and on February 28, 1899, entered into an agreement in writing, plaintiff being party of the first part, and Francis Crawford being party of the second part, which was duly recorded in the office of the register of the county of New York, in and by which it was provided that the plaintiff should forewith construct a party wall, the center line of which should be the line between the two lots. It was further provided that the entire cost of constructing the wall should be borne by the plaintiff, or his assigns, and that "the said party of the second part hereto, or his assigns, shall be at liberty at any time hereafter to use the said wall for all the purposes of a party wall for any house, which he, or his assigns, may erect on said land, owned by the said party of the second part, upon payment by the said party of the second part, or his assigns, to the said party of the first part, his legal representatives or assigns, the sum of five hundred dollars in cash, such payment to be made when the wall is used." It was further provided that, should it become necessary to repair or to rebuild the wall after the same should be used by the said party of the second part, or his assigns, the cost thereof should be borne equally by the parties,

or their representatives, heirs, executors, administrators, or assigns. The final clause of the agreement was as follows: "Fifth. That this agreement shall be binding on and enure to the benefit of the heirs, executors, administrators and assigns of the respective parties hereto, and shall be construed as a covenant running with the land," etc. The plaintiff built the wall contemplated, in connection with the construction of his building. Francis Crawford died seized of the premises adjoining, and his executors conveyed them to another—subject to the party-wall agreement —who built upon the same, using the wall. The grantee of the executors conveyed the premises so built upon to the defendant, subject to the party-wall agreement. This action was brought to enforce a lien for the amount due under the agreement for the use of the party-wall. The complaint was dismissed upon the merits, at the Special Term, and the judgment recovered by the defendant was affirmed by the Appellate Division in the First Department. The plaintiff further appeals to this court.

GRAY, J. (after stating the facts as above): The Appellate Division, in affirming the judgment for the defendant, based its determination upon the ground that the covenant in the party wall agreement did not run with the land, within the authority of certain decisions of this court, inasmuch as it did not create any privity of estate. This distinction was pointed out that "where the agreement does not contemplate the present construction of a party wall, but authorizes its construction by either party in the future, the rule is different, and the covenant is said to create a privity of estate and to run with the land." We think that this distinction is one which has been established by our decisions, and that a rule of property has thereby been created which should not be departed from. See Mott v. Oppenheimer, 135 N. Y. 312, 31 N. E. 1097, 17 L. R. A. 409, and Sebald v. Mulholland, 155 N. Y. 455, 50 N. E. 260.

Prior to the decision in Mott v. Oppenheimer the rule had become firmly settled that where an owner of property builds a party wall, under an agreement with his adjoining landowner that, when he or his assigns shall use it, he or they should pay the value of the party wall, the covenant of payment was not one which ran with the land. See Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 611; Scott v. McMillan, 76 N. Y. 141; Hart v. Lyon, 90 N. Y. 663. In the case of Cole v. Hughes, upon which were rested the decisions in Scott v. McMillan and in Hart v. Lyon, it was held, in substance, that the party-wall agreement, which was entered into for the purpose of permitting one of the parties to erect the wall, created no privity of estate between the contracting parties, but merely a privity of contract, leaving the burden or liability of payment with the original covenantor. Those cases were actions at law to recover one-half of the value of the party wall against subsequent adjoining owners, upon their using the wall, in which the plaintiff failed to recover. In the last one, of Hart v. Lyon, the covenant for payment was accompanied in the agreement by a further covenant that the expense of repairing or of rebuilding the party wall shall be borne equally by the parties, their heirs and assigns. This gave occasion to the court to hold that the latter covenant "should be construed as perpetual and as a covenant running with the land, while the other, being personal, could not be so regarded;" thus plainly intimating that there was a distinction to be observed, where the covenant was prospective in imposing a burden upon the land in the hands of its future owner. When the case of Mott v. Oppenheimer was decided, the rule of the cases referred to was not sought to be disturbed, and the decision proceeded upon the difference in the situation and in the agreement of the parties. There, neither of the parties to the agreement, apparently, was about to build, and they made it with reference to the future. They were adjoining owners of unimproved lots, and through the agreement obtained the necessary authority for the construction of a party wall thereafter by either, or by the successors in interest of either, and for the use of the same by the then adjoining owner upon his paying one-half of the then value of the portion used. Subsequently, and when the lands had come into other ownerships, such a party wall was built, and the plaintiff who had acquired the premises so improved, brought the action against the adjoining landowner, and was given a lien upon the defendant's premises for the value of one-half of the wall. It was held that the covenant of the parties to the agreement was not personal, and that it concerned the land and became annexed to the estate. "The effect of the contract," it was said, "clearly was to grant, or to create, an interest in the premises described." Later, in the case of Sebald v. Mulholland, 155 N. Y. 455, 464, 50 N. E. 260, 262, the case of Mott v. Oppenheimer was considered, and, adverting to the fact that it was not proposed in its decision, to change the rule of the earlier cases, it was held that it was distinguishable in its facts. That the distinction was pointed out

as being in this; that "the provisions of the agreement in that case related to the future use of the property, and there was no intention to provide for any present or existing situation;" that it was "made with the view that such a contract would be beneficial to the land of both parties, and would bind it when the conditions contemplated should subsequently arise. * * * But in the other cases, * * * as well as in the case at bar, the agreement was in effect a personal covenant between the parties." The agreement in Sebald v. Mulholland was made between one, who was "about to erect a building upon his lot," and another, owning the adjoining land, who agreed for himself and "his personal representatives," whenever he or they might desire to use the wall, to pay the due proportionate expense of its construction. The agreement differed from that in Mott v. Oppenheimer, not only in the respect dwelt upon in the opinion, but also in the fact that the covenant of payment was made by the adjoining lot owner for himself and "his personal representatives." Though I had written the opinion for the court in Mott v. Oppenheimer, I expressed myself as concurring with Judge Martin, who wrote in Sebald v. Mulholland, upon the ground that the contract then in question required a different construction from that in Mott v. Oppenheimer. It was different in the respects noted. The result of this last decision was to establish a test by which it should be ascertained when the covenant in a party-wall agreement ran with the land. The Appellate Division Justices have correctly pronounced upon the rule as it was left by the decisions mentioned, and, as I have said, it being a rule of property, it should stand.

The judgment appealed from should be affirmed.

NOTE.—*The Nature of Covenants Running with the Land as Determinative in Party Wall Agreements.*—The distinction drawn in the principal case between an agreement between one owner who is to build and the other to pay his proportional part of cost upon user and a general agreement that whoever may be the second builder shall pay such proportion to the first is a distinction not altogether fanciful. The latter was the agreement in Mott v. Oppenheimer, supra. Whoever under such agreement fortuitously should begin was told by the other party when both stood in precisely the same situation—the contract being no more to one's advantage than the other's—not only that he could build on this theory, but his grantees could purchase on this theory though both parcels are vacant. The adjoining parcels are each marketable on that idea. Equity would have an added incident in this circumstance, and the theory of intention of non-personal liability is more forcefully impressed, and the Mott case says: "The question whether a contract bearing relation to lands is personal, or whether it constitutes a charge upon the lands, obviously must be determined by a consideration if the expressed intentions and of the existence of any interest in the land raised by the covenants. Words of grants are not essential to create the interest and a covenant may be construed as a grant." The case also says "I think we may rest upon the rule that where the covenant concerns land, and is one which is capable of being annexed to the estate, and it appears that it is the intention of the parties expressed in the instrument, then it shall be construed as running with and charging the land therefor." There was no repair clause in the Mott case and the agreement there had the same final clause as in the principal case. We think the distinction very close, if indeed there exists any substantial distinction at all.

The case of Cook v. Paul, 4 Neb. (unoff.) 93, 93 N. W. 430, 66 L. R. A. 673, a commissioners' decision approved by the Supreme Court, discusses the authorities quite fully, holding the agreement there personal and not a covenant running with the land. It appears that the party of the second part was himself to build a brick building connecting it with a then existing wall and was to pay party of first part for all brick in the half of the wall next to the building to be erected, this agreement to be binding upon the heirs, assigns, executors and administrators of the parties thereto. It is easily perceived this is not nearly so strong an agreement as expressing an intention that it should be a covenant, as is found in the principal case. The word "assigns" is the only word for predicating such an intention and this does not appear to bind very strongly "assigns" of the second party, and if they are not bound hardly ought the "assigns" of the other. There is one breath for both parties. The annotation (quite extensive) to the Cook case refers only to New York cases for the personal agreement view, but the opinion embraces only Pennsylvania cases (noting that the rule was changed by statute), and cases from Indiana (Bloch v. Isham, 28 Ind. 27, 92 Am. Dec. 301; Conduitt v. Ross, 102 Ind. 160, 26 N. E. 198); West Virginia (Parsons v. Balto. B. & L. Ass'n, 44 W. Va. 341, 67 Am. St. Rep. 769, 29 S. E. 999), and one or two other states.

In Huling v. Chester, 19 Mo. App. 607, it was held that an agreement by one owner that the other may put a line wall on the dividing line, one-half on each side, which the former or his grantee shall have the right to join and use same by paying for one-half of said wall at the price brick-work may be worth at the time," did not obligate the former owner to pay the latter owner's grantee upon the former using the wall. The question whether there was a covenant running with the land did not strictly arise as in the principal case, as it was merely held in effect that there was no obligation to the grantee of the covenantee. There a benefit was claimed, that did not enure to the latter owner's lot. See

Gibson v. Holden, 115 Ill. 199, 56 Am. Rep. 146, 3 N. E. 282; Mackin v. Haven, 187 Ill. 480, 58 N. E. 448. See further along, Shopp v. Cheatham, 88 Mo. 498.

Such an agreement as is shown in the case of Mott v. Oppenheimer supra appears in Matthews v. Dixey, 149 Mass. 595, 22 N. E. 61, 5 L. R. A. 102. It was said that a grantee of the builder is assumed to be the party entitled to enforce payment from the uses of the wall, although assigns are not named.

The case of Sharp v. Cheatham, supra, shows an exceeding brief agreement—less than twenty lines—in which the party of the second part agrees that the party of the first part "shall place the walls of their building now in process of erection six inches on the lot now owned by the party of the second part, and the party of the second part further agrees that when he shall join said walls he will pay to the party of the first part one-half the cost of so much of said walls as he may join to." There is nothing said about heirs or assigns in the entire paper, but in form the document is as personal as a non-negotiable promissory note. The proceeding to enforce payment was one in equity, the court saying: Were this an action at law there would be little or no doubt that plaintiff could not successfully maintain her action. The opinion goes into quite a full discussion of the cases, among them the older New York cases, those at common law and others. Thus see Sounders v. Martin, 2 Lea (Tenn.) 213; Platt v. Eggleston, 20 Ohio St. 414; Ross v. Ullman, 104 Ill. 1; Burbank v. Pillsbury, 48 N. W. 475; Norfleet v. Cromwell, 70 N. C. 634. Plaintiff was the grantee of the alleged covenantee and defendant the quitclaim grantee of alleged covenantor. There were held to be cross-easements as to each owner and the case was saved by reason of the grantee of covenantor being a quitclaim grantee and for that reason standing in the shoes of one having actual notice. The principle of this case was followed in Keating v. Korphage, 88 Mo. 524.

In Loyal Mystic Legion v. Jones, 73 Neb. 342, 102 N. W. 621, the case of Cook v. Paul, supra, is said to be "one of the class of cases known in this (that) state as "unofficial" and "the court is not necessarily bound by anything said therein nor to the propositions of law enunciated on which the conclusions are predicated," and these propositions were disapproved. For an extended note on party wall see 89 Am. St. Rep. 915, 941, reporting the case of Dunscomb v. Randolph, 107 Tenn. 89, 64 S. W. 21. In that annotation are found as supporting the theory of covenant running with the land the greater number of cases, among others, Kimm v. Griffin, 67 Minn. 25, 69 N. W. 634, 64 Am. St. Rep. 385; Mickel v. York, 175 Ill. 62, 51 N. E. 848; Pew v. Buchanan, 72 Iowa, 637, 34 N. W. 453; Adams v. Noble, 120 Mich. 545, all based on intention of the parties. Cases from these same states holding contracts of a personal nature are not in actual conflict, and a study of them will merely reveal the disposition of courts as strict or other kind of constructionists in ascertaining intention. The principal case appears to have a spirit in it different from the general trend of modern decision, which is well illustrated in the two following cases from Kentucky, as compared with each other. Generally we believe the distinction stated in the principal case is not observed any further than as that situation may tend more clearly to show intention. For further citation of cases 30 Cyc. 793.

In Spalding v. Krundy (Ky.), 104 S. W. 293, 13 L. R. A. 149, the Kentucky Court of Appeals decided the question we have been considering purely upon equitable grounds. The facts show erection of wall with the boundary line between adjoining owners as the center line of the wall, with no agreement between the parties as to contribution towards expense, the builder paying for the wall. This wall was recognized by the vendees of each as a party wall. One of the later grantees built an extension to this wall, and the grantee of the adjoining lot built up to this wall, and it was held that he should contribute towards the costs of such wall. But it was said: "The measure of relief, however, is not the cost of the additions to the wall, but the moiety of the value of the additions at the time they were actually used by the defendants. They might never have been used, in which case no contribution whatever could be had. They might have been erected when the work was, for some reason, exceptionally costly, and used when the work could have been done at half price, or when the wall itself had become dilapidated by time."

This case discards all consideration about agreements being personal or covenants running with the land, the defendant in the case being the actual user of the wall and that wall as extended being recognized between plaintiff, its builder and defendant, its appropriator, as a party wall. The court admits its conclusion "is not free from doubt, and is contrary to the views held by a respectable number of courts;" "but," says the court, "we are of the opinion that a person who uses a wall erected on the dividing line by the owner of the adjacent lot should pay a reasonable and fair price for the use thereof, estimated at the time when the use takes place," and this independently of there being "no agreement express or implied concerning it."

This case is only distinguishable from the prior case of Ferguson v. Worroll (Ky.), 101 S. W. 966, 9 L. R. A (N. S.) 1261, which is flatfootedly opposed to the principal case in holding that the text found in 22 Am. & Eng. Enc. Law, 2d Ed, p. 255, that "the criterion for determining whether a covenant runs with the land is the intention of the parties" and for this "it is not necessary that the agreement should in terms purport so to do," and "there is no personal liability against the grantees or assigns of the original covenantors, except the one who first used the wall." The only substantial difference, in Kentucky, between agreement to create a covenant running with the land and recognition of a party wall not built under such an agreement is in the measure of relief, the agreement binds for one-half the cost when built, if so expressed, and actual user binds to pay one-half the cost when built, if so expressed, and actual user binds to pay one-half of the reasonable value when user begins, and there is a lien in the former case and probably not in the latter.

C.

JETSAM AND FLOTSAM.

START OF A CHIEF JUSTICE.

In the spring of 1866 a comparatively young lawyer of Chicago, accompanied by his bride of a few weeks, called at the unpretentious furniture story of Tobey Bros. Frank B. Tobey, now the venerable president of the Tobey Furniture Company, one of the largest establishments of its kind in the west, attended the callers, who, after much discriminating examination, purchased a small housekeeping outfit, comparatively inexpensive. This was loaded into a wagon, drawn by a single horse, and Mr. Tobey, at that time turning his hand to any and all kinds of work in connection with his business, mounted the driver's seat to make the delivery.

"May we ride home with you," asked the husband, somewhat diffidently. "It's a long way out to Twenty-Second street, and we will consider it a favor if we may accompany you."

Mr. Tobey cheerfully acquiesced in the request, and the couple fixed themselves comfortably among their newly acquired Lares and Penates, and the tedious trip over bad roads, with frequent quagmires of mud, was begun. The destination, an unpretentious cottage, finally was reached, and the young and smiling bride, with her equally elated husband, took an active part in the installation of the household effects.

Thus did Melville Weston Fuller, now, and for the past twenty years Chief Justice of the United States, with his young bride make their initial homecoming. Mr. Tobey, now past 75 years of age, delights in telling how he served this young lawyer, destined to occupy the office which perhaps conveys the greatest honor within the gift of the President of the United States.—Chicago Inter-Ocean.

IZAAK WALTON'S WILL.

Few of the many curious relics which have come under the hammer recently have been of greater interest than the original probate of the will of Izaak Walton, which is offered for sale. It is in a state of excellent preservation and bears the seal of the Court of Canterbury. The original will itself in Walton's clear handwriting is at Somerset House and its provisions evidence the simple and kindly nature of the author of the "Compleat Angler."

The will, which is dated August 9, 1683, is prefaced by the following words:

"In the name of God, amen. I Izaak Walton, the elder, of Winchester, being this present day in the ninetyeth yeare of my age, and in perfect memory, for which praised be God, but considering how sodainly I may be deprived of both, doe therefore make this my last will and testament as followeth. And, first, I doe declare my belief to be that there is onely one God, who hath made the whole world, and me and all mankinde; to whom I shall give an accompt of all my actions, which are not to be justified, but I hope pardoned, for the merritts of my Saviour Jesus. And because the profession of Christianity does, at this time, seeme to be subdivided into Papist and Protestant, I take it to be at least convenient to declare my beliefe to be, in all points of faith, as the Church of England now professeth. And this I doe the rather because of a very long and very trew friendship with some of the Roman Church."

After various bequests of land and houses to his family the testator wrote:

"I doe alsoe give five pound yearly, to be given to some maide-servant, that hath attained to age of twenty and and one yeare (not less) and dwelt long in one service, or to some honest poore man's daughter, that hath attained to that age, to be paid her at or on the day of her marriage; and that what money or rent shall remaine undisposed of shall be imployed to buy coles for some poore people that shall most need them, in the said towne; the said coles to be delivered last weeke in January, or in every first weeke in February; I say then, because I take that time to be the hardest and most pinching times with poore people; and God reward those that shall doe this without partiality, and with honesty, and a good conscience."—New Jersey Law Journal.

A CASE ABOUT A PIG.

Our exchange, The Criminal Law Journal of India, May 15th, 1909, Calcutta, contains among other cases the following; which strongly suggests one had best own only educated pigs, or he will be "liable to be punished."

We give the case in full as interesting in comparison with the style of reports in this country.

IN THE CHIEF COURT OF MYSORE.
(CRIMINAL REVISION No. 10 of 1907-08.)
August 21, 1907.

Present:—Mr. Justice H. V. Nanjundayya, Offg. Chief Judge.

In the Matter of SIDDA—Accused.

Penal Code (Act XLV of 1860), ss. 95, 290—Nuisance.

The accused reared a single pig and allowed it to stray in the public street.

Held, this was not an offense under section 290, Indian Penal Code, and that the conviction was illegal.

Criminal Revision in the matter of a reference of the District Magistrate, Tumkur, in the Case of Sidda, accused in Criminal case No. 100 of 1906-07.

Mr. K. Doraswami Iyer, District Magistrate of Tumkur, made the following order of reference in Criminal case No. 100 of 1906-07, on the file of the Amildar and 3rd Class Magistrate, Chiknayakanhalli.

The conviction here appears to be quite unwarranted. Section 290 of the Indian Penal Code does not apply at all because there was no "public nuisance" as defined by section 268, Indian Penal Code. It would stretch the definition very much in this case to construe it an illegal omission not to tie up one's animals. A pig is not one of those animals counted as dangerous to human life. The charge against the accused was that he allowed it to stray in the public streets and render them filthy. Do herds of cattle render our roads any less filthy? Here it was a solitary pig. The conviction is opposed to elementary reasoning. There are some small annoyances inseparable from the condition of "society" and people who elect to live together are expected not to object to them. The Amildar Magistrate would do well to bear in mind that very large and one of the most important provisions of the Code as contained in section 95, Indian Penal Code. Slight harm in certain instances is not punishable. But here the annoyance did not attain even to that small dignity.

Section 26 of the Cattle Trespass Act cannot apply here. Damage to a public road is con-

templated there. Pigs have a habit of digging up the ground and when they do that on a public road the owner would be liable to be punished; but here that was not the case.

The conviction seems to be bad and must be set aside. The records will be submitted to the Chief Court for orders.

Order.—The District Magistrate's view is correct. What the accused did was to rear a single pig which was allowed to go about in the public street, and caused some nuisance. This is not an offense at all. The conviction is quashed, and the fine, if levied, will be refunded.

Conviction set aside.

NEWS ITEM.

A PROPOSED SOLUTION OF THE TRUST QUESTION BY A DISTINGUISHED LAWYER OF VIRGINIA.

Mr. William L. Royall of the city of Richmond, Va., bar, has sent us a brief which he has printed, and which he proposes to ask the Supreme Court of the United States to allow him to file as an amicus curiae in the American Tobacco Company's case, to be argued at the beginning of the next term of that court. The brief discusses all of the most important questions involved in a proper control of the trusts, and it brings forward a theory entitled to very grave and serious consideration. Mr. Royall has appeared as counsel in the Supreme Court in a great many cases in the past thirty years.

It is very difficult in a notice of this length to fully state the most important elements of his discussion, but we give most of its leading features.

Mr. Royall says it is one's natural and inherent right to make innocuous contracts intended for his own benefit. There is no right to make vicious contracts or those which aim at the wanton injury of another. He illustrates his idea with the case of Keeble v. Hickeringill, 11 Mod. 74, decided by Lord Holt 200 years ago. In that case a man had a "decoy," at which he shot ducks for a living. His neighbor, who hated him, walked up and down his own water front, firing off his gun to frighten away the ducks. Lord Holt held that the neighbor had a right to set up a "decoy," and if his shooting there scared off the ducks no harm was done. This was competition. But if he shot from malice towards his neighbor, this was actionable. This doctrine was approved of in the Mogul case. App. Cases, 1891, p. 25. The whole question of liability turns on intention to injure.

Mr. Royall claims that many may do together whatever one may lawfully do alone. It is settled then, says he, that citizens have the right to make any innocuous contracts. and this is one of the "liberties" secured to the citizen by the Constitution. The right to compete then to the destruction of the rival, if the competition is fair, is a "liberty" secured by the Constitution. But there is no right to take an unfair advantage. The injury done by the "trusts" is in giving away their goods or in selling them below costs for the purpose of destroying a rival. There is a natural right to destroy him by fair competition, but no right to destroy him by giving away goods for the purpose of destroying him. This is the act of the malicious gunner.

The case of Nordenfeld v. Maxim, App. Cases 1894, p. 535, settled that the citizen has a natural and inherent right to put a reasonable restraint upon trade. There can be no trade that does not put some sort of restraint upon some sort of trade somewhere. This, then, is a "liberty" secured by the Constitution.

The common law forbade monopoly. In the case of Rex v. Waddington, 1 East 143, a man was convicted and severely punished under the common law for buying up all the hops near a village. He did not, of course, buy up every pound of hops, so that what the common law forbids is securing what is practically and substantially all the hops. The citizen then has a natural and inherent right to acquire a great deal of a commodity, and this is a "liberty" protected by the Constitution, but he must not acquire what is a substantial monopoly. But the Supreme Court of the United States declares that the Sherman law destroys a combination which tends to establish a monopoly.

Mr. Royall asks if this doctrine must not be revised? Where will the court draw the line? At Mr. W. J. Bryan's 25 per cent of control, or at 50 per cent, or where? He intends that the citizen (or many acting together) has a "liberty" to make all innocuous contracts, to put reasonable restraint upon trade, and to make combinations that "tend" to monopoly, but not to establish a practical monopoly. These, says he, are rights founded in nature and evolution and protected as "liberties" by the Constitution.

The Sherman law denounces "every" combination that restrains trade, and it consequently denounces them, and therefore makes itself obnoxious to the fifth amendment.

Mr. Royall claims that the late Mr. E. J. Phelps, who was one of the counsel in the Joint Traffic case, pirated a pamphlet he published in 1897, in which these views were set up, and put them before the Supreme Court of the United States as his own views and that the court practically gave up its previous views in the Trans-Missouri case, and in effect conceded the force of his argument. We cannot go into that question here, but Mr. Royall says in his brief that full information in the premises can be obtained from a book that the Neale Publishing Company of New York and Washington has just published for him, entitled "Some Reminiscences."

For practically dealing with the case, Mr. Royall says we must abandon the whole scheme of the Sherman law. That he insists is founded in a total misconception of the whole subject. It proceeds, he says, upon the idea that it will control the trusts by abridging the right of men to combine their resources and assets. This, he says, would end all co-operative business and send us back to barbarism.

What, he says, should be done is to forbid the trusts to give their goods away or sell them below cost (which is pro tanto the same thing) for the purpose of destroying a rival, and for the government to put itself between the weak man and the strong man and prevent the strong man from imposing upon the weak one. He admits the difficulty of doing this, but says we are not to be deterred from doing what ought to be done because of difficulties. If the government will pay all the costs and provide sufficient attorneys and other agencies there will always be complaints. Monopoly is of no consequence if prices are not raised above the nor-

mal, and if they are raised above the normal there will certainly be competition if the government will make competition safe.

Instead of interfering with the natural and constitutional right of combination, Mr. Royall would allow the freest play, but he would have the government punish the strong man until it made him desist from oppressing the weak man and then all would have their own.

Mr. Royall has drawn a bill, which he suggests to Congress to pass. He would have the Sherman law amended so as to confine it to unreasonable restraints upon interstate trade, and so as to forbid all wanton injury to competitors, and he would have all men forbidden to give their goods away or sell them below cost to destroy a rival. He has also drawn a bill for the states to pass relating to interstate trade.

BOOK REVIEWS.

CYCLOPEDIA OF LAW AND PROCEDURE VOL. 31.

This volume begins with Pleading and extends to Principal and Agent, inclusively. Pleading is by Professor Sunderland, of the University of Michigan; Pledges, by Professor Throckmorton, Dean of the Central University of Kentucky; Powers, by Professor R. C. Minor, of the University of Virginia, and Principal and Agent, by Professor Godard, of the University of Michigan, and Mr. Louis L. Hammon, the latter the author of many prior leading articles for the Cyc.

These subjects and their authors appear to make this volume one of the most important of the entire series. To give an idea of the elaborateness of treatment it may be said that Pleading takes up nearly 800 pages; Pledges, 100 pages; Powers, over 100 pages, and Principal and Agent, over 500 pages, about 80 per cent of this volume being devoted to these four subjects.

This volume is in buckram and, as is generally known, is published by The American Law Book Company, New York.

SCANLAN ON THE LAW OF CHURCH AND GRAVE.

This book is called The Clergyman's Handbook of Law, and is an interesting compilation of the rulings on a variety of subjects more or less related to each other and coming within the title selected for the work. It treats of church discipline, control of property, effect of secession and schism thereon, superior and subordinate, debts, incorporated and unincorporated church societies, rights of pew holders, schools, religious education, rights and relation of bishops, pastors, congregations, burial, burial lots, etc., etc., in their legal aspects, making upon the whole a very interesting and practical work for lawyers as well as being something of a guide for the clergy. The style is fair and thoroughly impartial and the author presents to the reader a very conclusive proof of painstaking research in the collection of authority. The points decided in the cases are briefly and clearly set forth.

The book is in one octavo volume, bound in cloth of 250 pages, exclusive of table of contents and index. The author is Charles M. Scanlan, LL. B. and the publishers are Benziger Bros., New York, Cincinnati, Chicago.

WHITE ON PERSONAL INJURIES ON RAILROADS.

The first four chapters of the above work of the author, Mr. Edward J. White, is more general in its nature and serves by way of introduction to the particular class of injuries as affected by the business, the existence or conduct of which has relation thereto.

The status of railroads to employees, passengers, licensees and trespassers is afterwards more particularly regarded, though it is not claimed or attempted to be shown that there is any "difference in the law of evidence as applied to personal injury actions against railroads and the law of evidence in personal injury actions in other vocations, except in so far as the public character of the business of such companies and the dangerous and powerful agencies employed in the business have made new rules or decisions necessary, in the recognition by the courts of the principles of the law, necessary for the protection of the lives and limbs of citizens." Even this distinction would scarcely put railroad injury cases in a class by themselves and, if it did, that would be a narrow field to which a law book should be confined. The book, therefore, does not make the test of an injury being connected with a railroad the prime test of a question of principle being discussed, though it may happen that the injury has such an environment. But in this book the author's text is generally based on railroad injury cases, while he is mindful of the need of producing a book useful so far as substantive law is concerned in its general as well as its particular application. It may be said, therefore, that the practitioner, whether his action for a personal injury relate to a railroad or not, will find this work of benefit, while the research of the author has given to his work an added value for its particular bearing.

The arrangement, style and citation of supporting authority show care, industry, patience and lawyerlike treatment and we believe the two volumes should be deemed a contribution to legal literature of a sort fully justifying its having been made.

These volumes are in buckram and published by The F. H. Thomas Law Book Company, St. Louis, Mo.

HUMOR OF THE LAW.

An old bachelor lawyer residing in an old New England community bought a pair of socks and found attached to one a paper with these words: "I am a young lady of twenty, and would like to correspond with a bachelor with a view to matrimony." The name and address was given. The bachelor wrote, and in a few days got the reply:

"Mamma was married twenty years ago. Evidently the merchant of whom you bought those socks did not advertise, or he would have sold them long ago. My mother handed me your letter and said possibly I might suit. I am eighteen."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

1. **Adverse Possession**—Color of Title.—One claiming under deeds calling for connection at a point 950 varas distant from a corner of a survey has no title or color of title to any part of the survey within the three-year statute of limitations.—McCaleb v. Campbell, Tex., 116 S. W. 111.

2.——Property Dedicated to Public Use.—Property dedicated to public use held not subject to the usual rules as to adverse possession.—McClenehan v. Town of Jesup, Iowa, 120 N. W. 74.

3. **Appeal and Error**—Examination of Adverse Party.—The form of questions put by a party to a hostile witness is largely within the discretion of the trial court, and the Supreme Court will not interfere unless such discretion has been abused.—Ryan v. Oshkosh Gaslight Co., Wis., 120 N. W. 264.

4.——Judgment.—Where the court undertook to correct the effect of an erroneous charge allowing interest, by permitting plaintiff to write off any possible interest, but by an error, the amount so written off was insufficient, the Supreme Court will affirm the judgment with direction that the proper amount be written off.—Seaboard Air Line Ry. v. Bishop, Ga., 63 S. E. 1103.

5. **Army and Navy**—Courts Martial.—Civil courts are not courts of error to review the proceedings and sentences of courts-martial, legally organized and having jurisdiction.—Mullan v. United States, U. S. S. C., 29 Sup. Ct. 330.

6. **Auctions and Auctioneers**—Acceptance of Bid.—A bid at an auction is an offer to purchase at the price named, and until it is accepted no contract relation exists.—Anderson v. Wisconsin Cent. Ry. Co., Minn., 120 N. W. 39.

7.——Binding Effect of Bid.—Advertisement that porperty will be sold at auction to highest bidder held not an offer to sell, which becomes binding on the owner when a bid is made.—Anderson v. Wisconsin Cent. Ry. Co., Minn., 120 N. W. 39.

8. **Bankruptcy**—Involuntary Proceedings.—An involuntary proceeding in bankruptcy may be based on a claim for unliquidated damages on breach of warranty of sale, though such petitions may be filed only by creditors having a provable claim; the claim in question being provable under section 63a of that act.—Frederic L. Grant Shoe Co. v. W. M. Laird Co., U. S. S. C., 29 Sup. Ct. 332.

9. **Bastards**—Inheritance.—The common law governs the relation of illegitimate children to their fathers, and it does not recognize any right in them to any interest in their father's estate.—Hayworth v. Williams, Tex., 116 S. W. 43.

10. **Bills and Notes**—Bona Fide Purchasers.—That circumstances surrounding the purchase of a note before maturity would excite the suspicion of a prudent man will not defeat recovery.—First State Bank v. Borchers, Neb., 120 N. W. 142.

11.——Construction.—An instrument executed by the special agent of a fire insurance company, directing it "on acceptance" to pay a specified sum in settlement of a fire loss, held not a negotiable instrument, within Rev. Laws, c. 73.—Berenson v. London & Lancashire Fire Ins. Co. of Liverpool, England, Mass., 87 N. E. 687.

12.——What Law Governs.—A note executed in Michigan and sent to Wisconsin for the signature of a person, who signed his name on the back and by direction of the maker sent it to the payee in Michigan, held to be a Michigan contract, and the liability of the person governed by the law of that state.—Hackley Nat. Bank of Muskegon v. Barry, Wis., 120 N. W. 275.

13. **Boundaries**—Evidence.—In determining the location of a boundary line under an old patent, a survey of junior patents calling for that line in a former suit is evidence by reputation as to such location; the surveyor being dead.—Thurman v. Leach, Ky., 116 S. W. 300.

14. **Brokers**—Right to Commissions.—A broker, having failed to make a sale on terms imposed by the owner's agent, held not entitled to a commission upon a sale to the same purchaser by the owner on different terms and not as a result of the negotiations instituted by the broker.—Jones v. Buck, Iowa, 120 N. W. 112.

15. **Carriers**—Interstate Commerce Act.—An action will lie in a state court for the difference between a schedule rate filed under the interstate commerce act and the rate charged.—A. P. Brantley Co. v. Ocean S. S. Co., Ga., 63 S. E. 1129.

16.——Proximate Cause of Injury.—A carrier held not liable where a person, while endeavoring by running along a rapidly moving train to restore a child to its mother, stumbles over a truck on the platform, and the child is injured.—Atchison, T. & S. F. Ry. Co. v. Calhoun, U. S. S. C., 29 Sup. Ct. 321.

17. **Constitutional Law**—Equal Protection of Law.—The possible invalidity as to individuals of Act Ark. Jan. 23, 1905 (Acts 1905, p. 2) sec. 1, penalizing the doing of business within the state by members of a trust does not render such provisions invalid as to corporations, as denying equal protection of laws.—Hammond Packing Co. v. State of Arkansas, U. S. S. C., 29 Sup. Ct. 370.

18. **Contempt**—Sufficiency of Evidence.—A contempt proceeding being quasi criminal in character, so that a conviction should not be sustained on certiorari unless the proof is clear and satisfactory, yet, if there is such evidence, the action of the trial court should not be set aside merely because some evidence was erroneously received.—Russell v. Anderson, Iowa, 120 N. W. 89.

19. **Contracts**—Construction.—The statutory provision that a contract must be construed against a party in the sense which he understood the other party to have intended it has no application, where the language is plain and unambiguous.—Cole v. Harvey, Iowa, 120 N. W. 97.

20.——Joint and Several Obligation.—Where defendants signed a contract obligating themselves jointly to pay plaintiff $1,200 on the happening of a certain event, the obligation could be enforced against them or any one of them on the happening of the event under Code sec. 3465.—Cole v. Harvey, Iowa, 120 N. W. 97.

21.——Time of Performance.—Where a contract stipulates for the doing of some act, but does not specify the time within which it is to be done, the parties will be held to have intended a reasonable time.—Western Lime & Cement Co. v. Copper River Land Co., Wis., 120 N. W. 277.

22. **Corporation**—Action by Stockholders.—A nonconsenting stockholder held entitled to sue to prevent the consummation of an illegal scheme on the part of the majority of the stockholders to increase the old company's stock by the organization of a new corporation and transferring a part of the old company's assets to it.—Schwab v. E. G. Potter Co., N. Y., 87 N. E. 670.

23.——Illegal Acts.—A stock corporation held not authorized by Stock Corporation Law, sec. 40 (Laws 1892, p. 1834, c. 688), nor any other statute, to incorporate another corporation and convey to it a part of the old company's assets, receiving in return all of the new corporation's stock.—Schwab v. E. G. Potter Co., N. Y., 87 N. E. 670.

24. **Deeds**—Delivery.—The delivery of a deed to a third person or the recording of the same with the intention on the part of the grantor to divest control of it is such a delivery as to vest the title in the grantee.—McCord v. Bright, Ind., 87 N. E. 654.

25.——Execution in Blank.—Where a deed was executed and delivered with the name of the grantee blank upon certain understanding and the name of the purchaser was thereafter inserted as grantee, held, that the deed, when completed, conveyed the land.—Mahoney v. Salsbury, Neb., 120 N. W. 144.

26.——Presumption of Acceptance.—Where the grantee in a deed is an infant, acceptance is presumed from the fact of delivery, if the interest conveyed is beneficial.—McCord v. Bright, Ind., 87 N. E. 654.

27. **Equity**—Jurisdiction.—Complainant cannot urge as a ground for jurisdiction in equity that defendant would thereby be saved a multiplicity of suits, where defendant raises no objection to such possible suits.—Equitable Life Assur. Society of United States v. Brown, U. S. S. C., 29 Sup. Ct. 404.

28.——Jurisdiction.—Where equity has obtained jurisdiction of a controversy, and one of the parties has made the application of the specific relief sought impossible or impracticable, the court will retain jurisdiction to give damages to the injured party, or decree such other relief as may be just.—Johnson v. Carter, Iowa, 120 N. W. 320.

29. **Evidence**—Explanation of Terms.—In an action for the price of chemical apparatus, defended on the ground that retorts did not conform to the contract, parol evidence was admissible to show what was meant by the term "retorts."—McKinnon Boiler & Machine Co. v. Central Michigan Land Co., Mich., 120 N. W. 26.

30.——Expressions of Bodily and Mental Feelings.—When the bodily or mental feelings of an individual is a material issue in a case, the expressions of such feelings made at the times in question is admissible as original evidence.—Texas Cen. R. Co. v. Wheeler, Tex., 116 S. W. 83.

31.——Intent.—Where the intentions of an interested witness become a matter of judicial inquiry, they are ascertained by consideration of his conduct, and not by his declarations or testimony as to what his intentions were.—Lewis v. McDonald, Neb., 120 N. W. 207.

32.——Powers of Agent.—Conversations between an agent with a power to convey land and his grantee thereunder, and between the latter and the attorney who drew the power, were inadmissible to vary the terms of the power by extending the authority conferred thereby.—Welke v. Wackershauser, Iowa, 120 N. W. 77.

33.——Presumptions.—The mailing of a letter held not to raise a presumption of either law or fact that it was received, but it is a circumstance from which such inferrence is fairly deducible.—Continental Ins. Co. of New York v. Hargrove, Ky., 116 S. W. 256.

34.——Presumptions.—If knowledge of the law is to be inferred from the official position of one charged with corrupt violation thereof, such inference would be one of fact, which might or might not be drawn by the trial court in determining the question of corruption.—Vogel v. Brown, Mass., 87 N. E. 686.

35.——Varying Terms of Written Instruments.—Parol evidence is inadmissible to vary the terms of a written lease, but it is admissible in support of the contract to show in what manner it was understood by the parties.—Chamberlain v. Brown, Iowa, 120 N. W. 334.

36. **Exchange of Property**—Rescission.—Ordinarily a party entitled in equity to rescind an exchange of lands is entitled to judgment for the land conveyed by him or its value, conditioned on a reconveyance free from incumbrance of the land received.—Campbell v. Moorehouse, Iowa, 120 N. W. 79.

37. **Execution**—Sales.—An execution sale of real estate is not consummated until the certificate of sale is executed and delivered to the purchaser.—Kissinger v. Zieger, Wis., 120 N. W. 249.

38. **Fire Insurance**—Additional Insurance.—The assent of insurer to additional insurance need not be in writing, though the policy stipulates that agreement for other insurance unless in writing shall not be binding.—Northwestern Nat. Ins. Co. of Milwaukee v. Avant, Ky., 116 S. W. 274.

39. **Federal Courts**—Discrimination Against Negroes as Jurors.—Whether or not discrimination against negroes was practiced by the jury commissioners in the selection of jurors is a question of fact, and decision of state court is conclusive on the federal Supreme Court on writ of error, unless so grossly wrong as to amount to an infraction of the federal Constitution.—Thomas v. State of Texas, U. S. S. C., 29 Sup. Ct. 393.

40. —— Following State Decisions.—The meaning of a policy of insurance issued by a New York company and executed and to be carried out in that state as declared by the highest court of the state is of the most persuasive influence on the federal court.—Equitable Life Assur. Society of United States v. Brown, U. S. S. C., 29 Sup. Ct. 404.

41.——Full Faith and Credit.—A complaint invoking full credit for judgments of another state held not to present a case arising under the federal Constitution so as to permit a review in the Supreme Court under Act March 3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 54).—Bagley v. General Fire Extinguisher Co., U. S. S. C., 29 Sup. Ct. 341.

42.——Log Boom in Navigable Stream.—Whether the construction of a log boom in a navigable stream entirely within the state is authorized by the state statute held not a federal question sustaining error from the Supreme Court.—North Shore Boom & Driving Co. v. Nicomen Boom Co., U. S. S. C., 29 Sup. Ct. 335.

43.——Probate Matters.—The value of a matter in dispute in a suit to set aside judgments of the probate court establishing claims against an estate is the aggregate amount of the claim whose allowance was procured in furtherance of an alleged combination.—McDaniel v. Traylor, U. S. S. C., 29 Sup. Ct. 343.

44. **Fraud**—Corporation and Officers.—Where a stockholder in a corporation was deprived of his interest by the fraudulent manipulation of its assets by the controlling officer, the stockohlder, in order to obtain relief, was not bound to pursue the corporation and such officers separately or trace the corporation's funds.—Heckendorn v. Romadka, Wis., 120 N. W. 257.

45.——Evidence.—While fraud is not presumed, courts cannot ignore clear and convincing indicia of bad faith, or refuse to draw inferences of fraud where the circumstances irresistibly point to it.—Johnson v. Carter, Iowa, 120 N. W. 320.

46. **Fraudulent Conveyances**—Services of Insolvent Husband Rendered Wife.—An insolvent husband may render services to his wife in managing her business or give time and labor to the improvement of her separate property without his creditors acquiring a right as against her or her property.—Jones v. Hogan, Mo., 116 S. W. 2.

47. **Gaming**—Persons Liable.—One who permits others to conduct a saloon in his name is liable for losses at gaming carried on at that place, though he exercises no control over the saloon, and does not participate in the profits thereof.—Cartwright v. McElwain, Ky., 116 S. W. 297.

48. **Habeas Corpus**—Commitment for Contempt.—Irregularities in proceedings before a justice of the peace committing a recusant witness cannot be reviewed by habeas corpus.—Ex parte Button, Neb., 120 N. W. 203.

49. **Homestead**—Claim of Wife.—Where a husband deserts his wife, leaving her in possession of the homestead, she is entitled to it.—First Nat. Bank v. McClanahan, Neb., 120 N. W. 185.

50.——Conveyance.—The sole deed of a married man conveying his homestead and other lands is void as against the homestead estate, though valid as to the other lands.—Wilson v. Wilson, Neb., 120 N. W. 147.

51. **Homicide**—Deadly Weapons.—A baseball bat is not, per se, a deadly weapon, especially when considered with reference to its use.—Crow v. State, Tex., 116 S. W. 52.

52. **Husband and Wife**—Actions Between.—Proof that defendant married plaintiff pendente lite while she was incompetent, in order to obtain possession of her property, held sufficient to justify the denial of his motion to dismiss the suit.—Holland v. Riggs, Tex., 116 S. W. 167.

53.——Common Law Obligations.—The husband is still bound by his common-law obligation to support his wife, and is entitled to the benefit of her domestic services.—Vose v. Myott, Iowa, 120 N. W. 58.

54.——Conveyances Between.—A deed from a wife directly to her husband without the intervention of a trustee is void at law.—McCord v. Bright, Ind., 87 N. E. 654.

55.——Lease of Joint Property.—Where a husband leased his and his wife's joint property, and the wife received for several years the benefits of the lease, the wife could not ratify one part of the lease and repudiate the obligations imposed on her in another part.—Chamberlain v. Brown, Iowa, 120 N. W. 334.

56.——Support of Husband.—At common law, the wife is not liable for her husband's support, and Code, §3165, making the family expenses chargeable against both husband and wife, does not make her liable for board furnished the husband.—Vose v. Myott, Iowa, 120 N. W. 58.

57.——Tenancy in Common.—A husband and tenant in common with his wife has no authority to sell or lease the property or to bind the wife in any manner as to her separate interest therein.—Chamberlain v. Brown, Iowa, 120 N. W. 334.

58. **Injunction**—Enforcement of Judgment.—An executor's surety, though having agreed to indemnify the surety on the administrator's supersedeas bond given to perfect an appeal, held without interest sufficient to entitle it to

enjoin the collection of a judgment against the supersedeas surety.—Bankers' Surety Co. v. Wyman, Iowa, 120 N. W. 116.

59. **Insane Persons**—Repudiation of Suit by Next Friend.—Where an insane person repudiated a suit by her next friend to set aside a conveyance, the court properly directed a verdict for defendant if plaintiff was sound of mind, either when the suit was brought or at the time of the trial.—Holland v. Riggs, Tex., 116 S. W. 167.

60. **Intoxicating Liquors**—Damages for Unlawful Sale.—In an action against a druggist and his sureties for unlawfully selling liquor to plaintiff's husband, evidence of sales of liquor to other persons held competent.—Lockard v. Van Alstyne, Mich., 120 N. W. 1.

61.——Evidence as to Sale.—In an action against a druggist and his sureties for unlawfully selling liquor to plaintiff's husband, evidence of sales of liquor by the druggist was admissible as affirmative evidence of want of good faith, though his attention had not been called to such sales.—Lockard v. Van Alstyne, Mich., 120 N. W. 1.

62. **Judgment**—Revival of Dormant Judgment.—In proceedings to revive dormant judgment, judgment debtor cannot plead independent cause of action against judgment creditor.—Lashmett v. Prall, Neb., 120 N. W. 206.

63. **Justices of the Peace**—Appeal.—A circuit or superior court, in an action appealed from a justice of the peace, has the same power as the justice to permit amendments to the pleadings.—Holland v. Hummell, Ind., 87 N. E. 662.

64. **Landlord and Tenant**—Construction of Lease.—A lease fairly capable of two constructions will be given the construction most favorable to the lessee.—Chamberlain v. Brown, Iowa, 120 N. W. 334.

65.——Landlord's Lien.—A mortgage on a cotton crop was constructive notice to the landlord of its existence, so that, after receiving the crop, to discharge his own lien, the landlord was bound to account to the mortgagee, who was the junior lienor, for the surplus.—Peeples v. Hayley, Beine & Co., Ark., 116 S. W. 197.

66.——Restrictive Leases.—Where a lease expressly limits the use of the property to a specific purpose and prohibits its use for any other, equity on a proper showing will enjoin a tenant from violating the restriction.—Chamberlain v. Brown, Iowa, 120 N. W. 334.

67. **Levees**—Establishment.—The president of a levee district held without authority to bind it by an agreement with a landowner to arbitrate his damages from the construction of a levee.—Blum Bayou Levee Dist. v. Harper, Ark., 116 S. W. 196.

68. **Life Insurance**—Accounting by Mutual Company.—Frauds by the officers of a mutual life insurance company held not to entitle policy holders to an accounting and distribution of the surplus in any other manner than as provided for in the contract of insurance.—Equitable Life Assur. Society of United States v. Brown, U. S. S. C., 29 Sup. Ct. 404.

69. **Libel and Slander**—Instructions.—In an action for slander, charging immorality, instruction that, if the words as alleged were spoken, plaintiff was entitled to verdict in some amount, held proper.—Burch v. Bernard, Minn., 120 N. W. 83.

70. **Life Insurance**—Insurable Interest.—A person may insure his life for the benefit of one who has no insurable interest therein, if he does so in good faith to promote the beneficiary's welfare, and not in a collusive manner which would be equivalent to the beneficiary procuring the insurance.—Deal v. Hainley, Mo., 116 S. W. 1.

71.——Representations as to Health.—The question, in an application for life insurance, "Give full particulars of all diseases, injuries, and affections which you have had," refers to only such diseases as affect the general health and are of a serious nature, and not to temporary or trivial ailments.—Des Moines Life Ins. Co. v. Clay, Ark., 116 S. W. 232.

72. **Limitation of Actions**—Operation and Effect.—Though the remedy of a principal against his debtor is barred by limitations, the remedy of the principal against guarantors of the debt is not barred, where the guaranty itself is not barred.—Western Casket Co. v. Estrada, Tex., 116 S. W. 113.

73. **Logs and Logging**—Sale of Timber.—A deed conveying certain trees, with a right of way, etc., held not to entitle the purchaser to cut timber on the land to be used in the construction of tram roads and buildings on other lands.—Ward Lumber Co. v. Coleman, Ky., 116 S. W. 266.

74. **Mandamus**—Enforcement of Contract.—Mandamus will not lie to enforce a purely private contract; but when the contract becomes impressed with a public character, or the subject-matter is impressed with a public duty or a duty imposed by law, it will lie.—State v. Cadwallader, Ind., 87 N. E. 644.

75. **Marriage**—Effect of Insanity.—Where a husband marries his wife at a time when she was mentally incompetent, the marriage was void, and he acquired no rights in her property by virtue thereof.—Holland v. Riggs, Tex., 116 S. W. 167

76.——Fees.—A justice of the peace, requested to go to a private house to perform a marriage ceremony, or to make a marriage certificate different from his return to the city or town clerk, could lawfully demand and receive compensation therefor, in addition to the fee allowed by Rev. Laws, c. 204, § 26.—Vogel v. Brown, Mass., 87 N. E. 686.

77. **Master and Servant**—Contributory Negligence.—Where an explosion of gasoline followed the lighting of a match by an employee, whether he was guilty of contributory negligence held for the jury.—Reed v. Village of Syracuse, Neb., 120 N. W. 180.

78.——Injury to Railroad Employee.—It was a question for the jury to determine whether men repairing railroad track were subjected to the hazards peculiar to the operation of a railroad.—Christiansen v. Chicago, M. & St. P. Ry. Co., Minn., 120 N. W. 300.

79.——Liability for Injury to Servant.—An operator of a coal mine failing to exercise ordinary care in regulating the time and manner in which the miners should fire their blasts held liable for injuries to an employee by an explosion in the mine.—Edward's Adm'x v. Lam, Ky., 116 S. W. 283.

80.——Negligence.—The derailment of an engine, in the absence of explanation, raises a presumption of negligence against the railroad company.—Galveston, H. & S. A. Ry. Co. v. Thompson, Tex., 116 S. W. 106.

81.——Negligence.—Where, on a former ap-

peal, the interest which a devisee took was held a base fee, the decision became the law of the case, and binds the parties on a subsequent appeal, even though erroneous.—Steele v. Korn, Wis., 120 N. W. 261.

82.——Negligence of Independent Contractor.—As a general rule an employer is not liable for injuries to others from the negligence of an independent contractor or his employees.—Missouri Valley Bridge & Iron Co. v. Ballard, Tex., 116 S. W. 93.

83. **Mines and Minerals**—Revocation of License.—Formal defects in plaintiff's notice to quit mining ground held unavailable to defendant who claimed under an irrevocable license, by reason of the discovery of a crevice or range.—St. Anthony Min. & Mill. Co. v. Shaffra, Wis., 120 N. W. 238.

84.——Statutes.—Under St. 1898, § 1647, a lessee of mining rights, on discovering a prospect, held entitled to explore the same without right of the landlord to forfeit the lease.—St. Anthony Min. & Mill. Co. v. Shaffra, Wis., 120 N. W. 238.

85. **Mortgages**—Bond in Discharge of Receivership.—A surety on a bond given in discharge of a receivership in a mortgage foreclosure, conditioned for the payment of the amount found to be due plaintiff, is not liable for any indebtedness except that stated in the complaint claiming a lien.—Lacy Bros. & Kimball v. London, Ark., 116 S. W. 207.

86.——Equitable Rights.—An arrangement, whereby the name of another than the real grantee was inserted as grantee, he agreeing to hold the title in trust to secure a part of the puchase money advanced and to convey to the real grantee on payment thereof, held to place the apparent legal title in such other so that the real grantee and claimants under her could not deny his title.—Witmer v. Shreves, Iowa, 120 N. W. 86.

87.——Record as Notice.—The record of a mortgage held to be notice to subsequent purchasers, though it did not appear in the record chain of their title derived from the mortgagor.—Masters v. Clark, Ark., 116 S. W. 186.

88.——Renewal Note.—The holder of an original note and mortgage held not entitled to sue on a renewal note after foreclosure of the original note and mortgage and while such decree and sale remained in force.—Gibson v. Gutru, Neb., 120 N. W. 201.

89. **Municipal Corporations**—Construction of Municipal Ordinances.—Municipal ordinances must receive a reasonable construction in the light of the purpose of their enactment; and, where they are capable of a construction which will carry out their manifest purpose, such construction must be adopted.—C. Beck Co. v. City of Milwaukee, Wis., 120 N. W. 293.

90.——Defects in Sidewalk.—In an action against a city for injuries from a defective sidewalk, the questions whether the walk was reasonably free from defects and whether plaintiff was exercising ordinary care held for the jury.—City of Owensboro v. Williams, Ky., 116 S. W. 280.

91.——Taxpayer's Action.—A taxpayer held entitled to enjoin the execution of a contract for street paving, resulting from the bribery of a councilman, in violation of St. 1898, § 4475.—McMillan v. City of Fond du Lac, Wis., 120 N. W. 240.

92. **Monopolies**—Public Franchises.—A contract between a city and a water company's assignor granting an exclusive privilege to furnish water for fire hydrants, etc., held in violation of Const. art. 1, § 3, as a monopoly.—Hartford Fire Ins. Co. v. City of Houston, Tex., 116 S. W. 36.

93. **Negligence**—Dangerous Condition of Premises.—Defendant, having invited plaintiff to unload ties in its yard, held liable for injuries caused by the collapse of a pile of ties at which plaintiff was ordered to unload by defendant's servant, with knowledge of the unsafe condition of the pile.—Hobert Lee Tie Co. v. Keck, Ark., 116 S. W. 183.

94. **Pleading**—Certainty.—Where an answer is vague or uncertain, plaintiff's remedy is by motion to compel correction.—Electrical Accessories Co. v. Mittenthal, N. Y., 87 N. E. 684.

95. **Pledges**—Notes as Collateral Security.—A holder of a note as collateral security for a debt due from the payee therein holds it as the trustee of the pledgor.—Jefferson v. Century Sav. Bank, Iowa, 120 N. W. 308.

96. **Principal and Agent**—Conveyances.—An agent authorized to sell land can only sell for cash, unless specially authorized to sell on credit, and cannot convey by way of gift.—Welke v. Wackershauser, Iowa, 120 N. W. 77.

97. **Principal and Surety**—Payment by Surety.—Where the surety on a note held by the payee without any security from the principal maker paid a part thereof, the only right of the surety was to sue the principal maker for the amount so paid.—Jefferson v. Century Sav. Bank, Iowa, 120 N. W. 308.

98.——Release of Security.—The waiver by a creditor of his right to apply property of the principal debtor to the debt to the prejudice of the surety discharges the surety pro tanto.—Pauly Jail Bldg. & Mfg. Co. v. Collins, Wis., 120 N. W. 225.

99. **Public Lands**—Surveys.—A senior survey of public land must have its quantity of land out of the public domain, and junior surveys must give way to it.—McCaleb v. Campbell, Tex., 116 S. W. 111.

100. **Railroads**—Duty to Look and Listen.—If a team became unmanagable, when 68 feet from a railway crossing, from fright at an approaching train, and the driver was unable to prevent them continuing in their course and colliding with the train, held that he was excused from the duty of looking and listening and stopping, if necessary for his safety, before attempting to cross the track.—Sarles v. Chicago, M. & St. P. Ry. Co., Wis., 120 N. W. 232.

101.——Failure to Signal at Crossings.—The penalty for failure of a railroad company to ring a bell or sound a whistle at a highway crossing is recoverable by civil action only; and, where a criminal prosecution is instituted, the case should be treated and tried as a civil action.—Louisiana & A. Ry. Co. v. State, Ark., 116 S. W. 193.

102.——Injury at Crossing.—The mere fact that it would have been possible for a person of ordinary prudence to have seen the train which struck plaintiff, but which plaintiff did not see, would not preclude plaintiff's recovery, since his failure to notice it may have been excused by the surrounding circumstances.—Texas & N. O. R. Co. v. Reed, Tex., 116 S. W. 69.

103.——Killing Stock.—To escape absolute liability to the owner of stock killed by trains, a railroad company must show that it had its road so fenced as to prevent stock of ordinary disposition from entering the right of way.—Texas Cent. Ry. Co. v. Wills, Tex., 116 S. W. 145.

104.——Negligence.—Where several railroads rely on and make general and joint use of a tower for signals for a crossing of their roads at grade, and the safety of which they are all bound to guard, each road is liable for the proper operation of the tower.—Gorman v. New York, C. & St. L. R. Co., N. Y., 87 N. E. 682.

105.——Negligence.—A railroad company has no right to push cars against a car being unloaded without warning.—Louisville & N. R. Co. v. Hurst, Ky., 116 S. W. 291.

106. **Reformation of Instruments**—Mistake as to Price.—One paying more for property under a written contract to purchase than the parties had agreed upon held entitled to recover at law for the money paid through mistake without reforming the contract.—Ragsdale v. Turner, Iowa, 120 N. W. 109.

107. **Religious Societies**—Control of Property.—Orders of general religious organization as to church affairs and church government of congregations belonging to the same held binding, and not reviewable by the courts to determine their regularity, or accordance with the discipline of the general organization.—St. Vincent's Parish v. Murphy, Neb., 120 N. W. 187.

108.——Orders of Governing Authority.—Members of a church of a particular denomination, not pretending to have any title to its property except as members, may be enjoined from using it contrary to the determination of the governing authorities of such denomination.—St. Vincent's Parish v. Murphy, Neb., 120 N. W. 187.

109. **Schools and School Districts**—Suspension of Pupils.—The remedy of a parent whose child has been unlawfully suspended from school held by mandamus to compel the school authorities to allow the child to attend school.—Douglas v. Campbell, Ark., 116 S. W. 211.

110. **Street Railroads**—Defects in Track.—A street railway company, purchasing the property and franchise of another company, held to assume, not only the common-law obligation, but the contractual obligation, created by the franchise to the selling company, of keeping the tracks in repair so long as they are permitted to remain in the streets.—Citizens' Ry. & Light Co. v. Johns, Tex., 116 S. W. 62.

111. **Sunday**—Conduct of Business.—One conviction for opening a place of business on Sunday in violation of Pen. Code 1895, art. 199, bars a prosecution for opening at other times on the same day.—Muckenfuss v. State, Tex., 116 S. W. 51.

112.——Judgment.—The spreading of a judgment on the records by the clerk of the court is a ministerial, not a judicial, act and is not void because done on Sunday.—Puckett v. Guenther, Iowa, 120 N. W. 123.

113. **Telegraphs and Telephones**—Maintenance by Individual.—An individual may own and operate a telephone system and may, as authorized by statute, set and maintain his poles and other fixtures along and across public highways.—State v. Cadwallader, Ind., 87 N. E. 644.

114.——Power of State to Regulate.—The state may prescribe reasonable regulations for the conduct of the business of telegraph companies within its jurisdiction.—State v. Western Union Telegraph Co., Ind., 87 N. E. 641.

115. **Trade-Marks and Trade-Names**—Infringement.—Such unfair conduct as is calculated to deceive the public into believing that the business of the wrongdoer is the business of him whose trade-name or trade-mark is appropriated is the gist of the infringement of a trade-mark or trade-name, and equity will protect the owner of the trade-name or trade-mark.—Ball v. Broadway Bazaar, N. Y., 87 N. E. 674.

116. **Trial**—Direction of Verdict.—Where the evidence was undisputed that the holder of a note purchased it before maturity, and in good faith, a verdict was properly directed in its favor.—Second Nat. Bank v. Snoqualmie Trust Co., Neb., 120 N. W. 182.

117.——Instructions.—In an action for personal injuries, requested instructions, based upon the theory that plaintiff was a bare licensee on the premises where he was hurt, were properly refused, where he was on the premises by invitation when injured.—Chicago & E. I. Ry. Co. v. Hendrix, Ind., 87 N. E. 663.

118.——Special Interrogatories.—Refusing to submit to the jury a special interrogatory on an evidential fact on the question of ordinary care, and instead submitting such fact by an instruction under the question dealing generally with ordinary care, held proper.—Palmer v. Schulz, Wis., 120 N. W. 348.

119. **Trusts**—Accounting.—Where an administrator sold certain assets "in his hands" at the time of the sale, whether the intestate's interest in a trust fund was in his hands so as to pass by the transfer was a question of fact for the jury, in an accounting by the trustee of the fund.—Routledge v. Elmendorf, Tex., 116 S. W. 156.

120. **Vendor and Purchaser**—Breach of Contract.—On a vendee's breach of contract, the vendor may either tender a deed and compel specific performance or maintain an action for the difference between the contract price and the value of the land.—Clifton v. Charles, Tex., 116 S. W. 120.

121.——Performance.—The vendor, on being tendered the purchase money, is required to execute a deed in accordance with the sale contract, and the vendee on tender of a deed must render the consideration.—Clifton v. Charles, Tex., 116 S. W. 120.

122.——Quit Claim Deeds.—A quit claim deed covering parts of a survey not previously conveyed gave the grantee and his successors no better title against those claiming under a prior deed than the original grantor would have.—Raley v. Magendie, Tex., 116 S. W. 174.

123. **Wills**—Burden of Proof.—One attacking the validity of a will of a testator, who died leaving a wife and child, on the ground that he gave more than half his estate to an educational institution, in violation of Laws 1860, p. 607, c. 360, has the burden of showing the invalidity of the will.—In re Durand, N. Y., 87 N. E. 677.

124.——Validity of Bequest.—A testator may lawfully make a part of a legacy interest thereon from a specified date before his death.—In re Duncanson's Estate, Iowa, 120 N. W. 88.